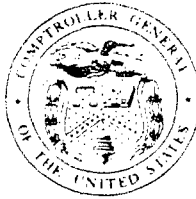


DECISION



Fitzmaurice
15945
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-200594

DATE: January 22, 1981

MATTER OF: Rowe Contracting Service, Inc.

DIGEST:

[Protest Alleging]

1. Failure of low offeror to make site inspection] even if solicitation requires inspection does not affect validity of contract award.
2. Contracting agency's failure to follow regulation in making award during pendency of protest is procedural defect which does not affect validity of award; moreover, protester has not been prejudiced by agency's decision since award to low offeror was proper.

Rowe Contracting Service, Inc. (Rowe), [protests the award of a contract] to Q&S Custodial & Maintenance, Inc. (Q&S), under request for proposals (RFP) No. MDA904-81-R-2011 issued by the National Security Agency (NSA), Fort George G. Meade, Maryland.

[The RFP solicited offers for custodial services to be performed at a facility located in Bad Aibling, Germany.] Three offers were received. Upon evaluation, Q&S was determined to be low and Rowe was found to be third low. When notified of NSA's intent to award the contract to Q&S, Rowe filed a protest with our Office arguing that it was entitled to the award since neither of the other two offerors had made a site visit as required by the RFP. NSA proceeded with the award despite the pending protest, on the ground that a hazard to health and safety would occur if custodial services were interrupted. Rowe protests this decision as well.)

We find no legal basis to question the award.

~~014684~~ 114193

Paragraph C.23 of the RFP provides:

"Offerors are urged and expected to inspect the site where services are to be performed and to satisfy themselves as to all general and local conditions which may affect the cost of performance of the contract, to the extent such information is reasonably obtainable. In no event will a failure to inspect the site constitute grounds for a claim after award of contract."
(Emphasis added.)

In addition, another portion of the specifications provides in pertinent part:

"Offerors or quoters are required to inspect the site where services are to be performed and to satisfy themselves as to all general and local conditions that may affect the cost of performance of the contract, to the the extent such information is reasonably obtainable. In no event will a failure to inspect the site constitute grounds for a claim after award of the contract. * * *."
(Emphasis added.)

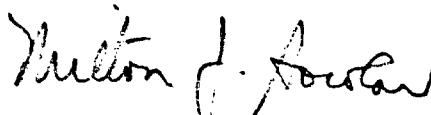
Although the above provisions appear to be in conflict concerning whether offerors were required to inspect the site, we believe that the purpose of both provisions is only to warn offerors that site conditions could affect the cost of contract performance and thus offerors assume the risk of any costs of performance due to observable site conditions. Cf. 52 Comp. Gen. 955 (1973). Moreover, we have held that even where a site inspection provision is written in mandatory terms, the failure to make such an inspection does not require the rejection of the bid or offer; rather, the provision is intended only as a warning that by failing to conduct a site inspection, offerors are assuming any risk of increased performance costs due to observable site conditions. See Edw. Kocharian & Company, Inc., 58 Comp. Gen. 214 (1979), 79-1 CPD 20.

In view of the above, we believe that Q&S's failure to conduct a site inspection had no affect on the validity of its offer. Nevertheless, NSA could have considered such a failure as a matter affecting Q&S's responsibility. See, e.g., Edw. Kocharian & Company, Inc.--request for modification, 58 Comp. Gen. 516 (1979), 79-1 CPD 326. [However, the record indicates that NSA determined Q&S to be a responsible offeror. Since our Office does not review an agency's affirmative determinations of responsibility absent a showing of fraud on the part of the agency or an allegation that definitive responsibility criteria have not been properly applied--neither exception being present here--we need not consider this matter further. Consequently, we find that Q&S's failure to conduct a site inspection provides no legal basis to question the award.]

Also, we find no basis to question NSA's decision to award the contract while the protest was pending. Under Defense Acquisition Regulation (DAR) § 407.8(b)(3) (1976 ed.), [a contracting agency is authorized to make such an award when it is in the best interests of the Government to do so.] Although from the record presented it appears that the contracting officer failed to obtain approval from a higher level as required by DAR § 407.8(b)(2), [we have held that such procedural deficiencies do not affect the validity of the award.] See, e.g., Commercial Lawn Maintenance, Inc., B-193626, February 2, 1979, 79-1 CPD 78. Moreover, in view of our earlier conclusion regarding Rowe's first ground of protest, we do not believe that Rowe was prejudiced in any way by NSA's failure to follow the regulation in question.]

By separate letter of today, we are notifying the Director, NSA, of the procedural deficiency in the award of the contract and also that, in the future, the word "required" should not be used in the specification for site inspections if such inspection is not in fact "required" but only recommended.

Protest denied.]



For the Comptroller General
of the United States